



FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MKB/153964

PRELIMINARY RECITALS

Pursuant to a petition filed June 14, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Disability Determination Bureau in regard to Medical Assistance, a hearing was held on January 21, 2014, at Racine, Wisconsin.

The issue for determination is whether the agency properly determined that the Petitioner is not disabled.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: No Appearance

Disability Determination Bureau
722 Williamson St.
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Racine County. He is almost 4 years old and lives with his family.
2. Petitioner's primary diagnosis is autism.

3. On February 7, 2013, an Application for Wisconsin's Children's Long Term Support Programs was submitted on behalf of the Petitioner. The application notes that the Petitioner is applying for the Family Support Program, Katie Beckett Program – Medicaid and CLTS Waiver for Autism Treatment Services. On May 3, 2013, the agency denied the Petitioner's application finding he is not disabled. On June 20, 2013, the Petitioner filed a request for reconsideration.
4. On December 27, 2012, a Diagnostic Evaluation of the Petitioner was performed by the Wisconsin Early Autism Project (WEAP). At that time, Petitioner was 2 years, 10 months old. He was noted to have speech delays and other speech issues. He was also noted to expressively identify objects, letters, numbers, colors, shapes and animal sounds at age-expected levels. He was reported to follow 3 step instructions. He was observed engaging in inappropriate toy play, throwing or dropping toys. It was reported that he does not spend much time playing with others. Transitions and changes were noted to be challenging. He was reported to have frequent tantrums, throws items, bites and hits others. He was not toilet trained. He is noted to be selective with food choices. The evaluator administered the Childhood Autism Rating Scale, Second Edition, Standard Version (CARS2-ST). Petitioner obtained a score of 29 placing him in the range of minimal symptoms of autism spectrum disorder (ASD). He had mildly elevated scores in categories of relating to people, imitation, visual response and nonverbal communication. He scored near the moderately elevated range for categories of emotional response, body use, object use and adaptation to change. He scored in the moderate range for verbal communication.
5. On February 19, 2013, a Psychological Evaluation of the Petitioner was performed by WEAP. He was noted to be cooperative and motivated. He became easily frustrated with tasks involving fine motor skills along with visual perception of organizing the whole or total picture. When frustrated, he was observed to swipe items off the table. The evaluator assessed Petitioner with the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III). Based on the results, Petitioner's general cognitive ability is in the average range of intellectual functioning as measured by his IQ of 96. This is considered to be in the 39th percentile and is comparable to same age peers. He obtained a verbal IQ of 104 which is the average range for same-aged peers. He obtained a Performance IQ of 87 which is in the low average range. It was noted that his skills in visual-spatial reasoning fell in the significantly below average range at the 5th percentile. Petitioner was also assessed with the Preschool Language Scale – Fifth Edition. He obtained a total language standard score of 99 which is the 47th percentile. On auditory comprehension, he obtained a standard score of 108 (70th percentile). On expressive communication, he obtained a standard score of 90 (25th percentile). On the Vineland Adaptive Behavior Scales – Second Edition (Vineland-II), he obtained a composite standard score of 86 (18th percentile). For the Communication Domain of the Vineland, he obtained a standard score of 102 (55th percentile). For the Daily Living Skills Domain, he had a score of 87 (19th percentile). For the Socialization Domain, he had a score of 77 (6th percentile). For the Motor Skills domain, he had a score of 88 (21st percentile). The WEAP recommended that Petitioner participate in intensive, home-based behavioral treatment.
6. On February 21, 2013, Petitioner was evaluated by the Early Childhood Program in the Waterford School District. Petitioner's adaptive, social and cognitive skills were assessed using the Battelle Developmental Inventory-2. His adaptive skills scored below average. His personal social skills scored slightly below average. His cognitive skills scored in the high average range.
7. On May 28, 2013, the Petitioner's physician prescribed intensive treatment using Applied Behavior Analysis for 35 hours/week.

DISCUSSION

The Children's Long Term Support (CLTS) program started on January 1, 2004 after the federal Department of Health and Human Services informed the state department that federal MA funding would no longer be available for in-home autism services. The department drafted and released the Interim Medicaid Home and Community-Based Waivers Manual ("the Manual") that became effective with the start of the CLTS program. It can be found on the internet at <http://dhs.wisconsin.gov/bdds/waivermanual/index.htm>.

The Manual provides that an individual must meet several eligibility criteria for these programs, one of which is that he must be disabled under social security standards. Manual, §2.05B.

Current standards for childhood disability were enacted following the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The current definition of a disabling impairment for children is as follows:

If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:

- (1) Must meet, medically equal or functionally equal the requirements of the listings [Listing of Impairments in appendix 1 of Subpart P of part 404 of this chapter], or
- (2) Would result in a finding that you are disabled under § 416.994a.

20 C.F.R. §416.911(b). §416.994a referenced in number (2) describes disability reviews for children found disabled under the prior law.

The process of determining whether an individual meets this definition is sequential. See 20 C.F.R. §416.924. First, if the claimant is doing "substantial gainful activity", he is not disabled and the evaluation stops. Petitioner is not working, so he passes this step.

Second, physical and mental impairments are considered to see if the claimant has an impairment or combination of impairments that is severe. If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it will not be found to be severe. 20 C.F.R. §416.924(c). In this case, the agency found the Petitioner's impairment is severe.

Next, the review must determine if the claimant has an impairment(s) that meets, medically equals or functionally equals in severity any impairment that is listed in appendix 1 of subpart P of Part 404 of the regulations. I reviewed listing number 112.10 for Autistic Disorder. To be eligible under the listing, the child must have marked impairments in two of the following domains: cognitive/communicative functioning, social functioning, personal functioning, and maintenance of concentration, pace, and persistence. If the child does not meet a listing, the review moves to the next step. I will move there immediately because the next step incorporates the listing areas but adds two additional areas (motor control and physical health).

If a child does not meet or equal the listing, the last step of the analysis is the assessment of functional limitations as described in sec. 416.926a of the regulations. This means looking at what the child cannot do because of the impairments in order to determine if the impairments are functionally equivalent in severity to any listed impairment. The child must have marked impairments in two of the following six domains: (1) cognitive/communicative functioning, (2) maintaining concentration, persistence, and pace, (3) social functioning, (4) motor control, (5) personal functioning, and (6) physical health. To be found disabled, the child must have marked limitations in two of the six areas, or an extreme limitation in one of the areas. 20 C.F.R. §416.926a(b)(2).

"Marked" limitation and "extreme" limitation are defined in the regulations at 20 C.F.R. §416.926a(e). Marked limitation means, when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations below the norm for the test (but less than three standard deviations). For children from ages three to age eighteen, it means "more than moderate" and "less than extreme". The regulation provides that a marked limitation "interferes seriously with the child's ability to independently initiate, sustain, or complete domain-related activities. Day-to-day functioning may be seriously limited when the child's impairment(s) limits only one activity or when the interactive and cumulative effects of the child's impairment(s) limit several activities." In comparison, "extreme" limitation means a score of at least three standard deviations below the norm or, for children ages three to age eighteen, "the impairment(s) interferes very seriously with the child's ability to independently initiate, sustain or complete domain-related activities."

Petitioner was found by the agency to have no limitations in domains 2, 4 and 6. He was found to have less than marked limitations in domains 1, 3 and 5. The Petitioner was represented at the hearing by his parents. They disagreed with the agency's assessment of domain #1, 2, 3 and 5.

The test scores of the Petitioner reflect that his limitations, while severe, do not meet the definition of "marked" or "extreme" limitations, with the exception of social functioning. Test results indicate the Petitioner's cognitive skills are average or above average. His communication skills, specifically his ability to acquire and use information, while affected by his autistic disorder are "less than marked" based on test scores for full scale IQ, verbal IQ and performance IQ as well as the Preschool Language Scale score. The Vineland Adaptive Behavior Scale shows results generally in the average – low average range for each domain with the exception of Socialization which was below the standard deviation.

The Petitioner's parents testified that Petitioner can acquire information but it is not clear that he can use the information he acquires appropriately. Things that he learns at school are not translated or transitioned to home. He can memorize information but he doesn't use it appropriately. They disagree with the conclusion that the therapy is having "good results". They have seen some positive results but report that he has a long way to go.

The Petitioner's parents further testified that the Petitioner has difficulty interacting and relating to others. He doesn't interact well with his twin. He doesn't understand social cues or prompts. They report that his social interaction skills have declined since they first applied. He becomes frustrated and throws things at others. He frequently laughs when he does this even if he hurts someone else. He engages in biting himself and others. Recently, at a restaurant, he threw his plate across the room. He gets very loud in inappropriate places.

According to the Petitioner's parents, his ability to concentrate or remain on task has declined. The testing he had done went well but they believe that some of that might be attributed to the fact that it was a new task for him and therefore held his attention more than might otherwise be normal. They testified that he rarely sits still, has a tendency to kick things or lies on the floor and becomes limp when he doesn't want to do something. His random behavior issues interfere with him completing tasks. Also, he has some difficulties with certain activities of daily living (ADLs) such as dressing.

The evidence is somewhat inconsistent with test scores supporting the agency analysis that the Petitioner is not disabled because he does not have marked limitations in at least two domains. Based on the Vineland Socialization score, I conclude that he does have a marked limitation one domain, social functioning but, at this time, there is not sufficient evidence to conclude that there is a marked limitation in at least two domains. The anecdotal evidence of the parents seems to indicate that the Petitioner's functional limitations have worsened since the tests were performed, particularly with regard to his concentration and communicative functions. The tests upon which this finding of no disability are made

are about a year old. This decision does not prevent the Petitioner's parents from having additional updated testing performed to determine if updated test results can show that he meets the criteria for a finding of disability.

CONCLUSIONS OF LAW

The agency properly determined the Petitioner is not disabled.

THEREFORE, it is

ORDERED

That the Petitioner's appeal is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

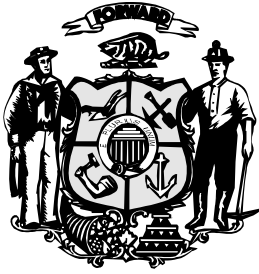
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 11th day of February, 2014

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 11, 2014.

Bureau of Long-Term Support
Division of Health Care Access and Accountability